STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JAMES JOHNSON,

Defendant-Appellant.

UNPUBLISHED
June 24, 2003

No. 239240
Calhoun Circuit Court
LC No. 01-002769-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

I. Facts

On April 24, 2001, defendant robbed Nick's Westside Plaza in Battle Creek. The cashier testified that, early that morning, defendant entered the store and brandished what appeared to be a shotgun wrapped in a towel. Defendant demanded money from the cash registers, the cashier gave defendant the money, and defendant left the store. The cashier later identified defendant as the perpetrator and he was arrested, tried and convicted of armed robbery, MCL 750.529. The trial court sentenced defendant to 96 to 300 months in prison. Defendant appeals, and we affirm.

II. Vior Dire

Defendant contends, erroneously, that the prosecutor improperly gave an opening statement during voir dire and that this violated defendant's right to a fair and impartial trial.

Defendant did not preserve this issue because he failed to object before the trial court and he expressed satisfaction with the jury as chosen. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). Defendant has also failed to demonstrate plain error that affected his substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). As this Court explained in *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996):

> The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially. *People v Brown*, 46 Mich App 592, 594; 208 NW2d 590 (1973). In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994); MCR 6.412(C). What

> constitutes acceptable and unacceptable voir dire practice "does not lend itself to hard and fast rules." *Id*. at 623. Rather, trial courts must be allowed "wide discretion in the manner they employ to achieve the goal of an impartial jury." *Id*. [Emphasis removed.]

Contrary to defendant's assertions, the prosecutor did not exceed the scope of voir dire. The prosecutor did not argue the facts of the case nor the evidence to be presented at trial. Rather, like defense counsel, and consistent with the Michigan law, the prosecutor merely attempted to elicit information from the jurors about any potential biases and their ability to view the evidence impartially. The prosecutor's hypothetical questions allowed both attorneys to uncover facts or opinions that would justify the exclusion of a juror and both attorneys exercised challenges for cause and peremptory challenges accordingly. Moreover, both attorneys expressed satisfaction with the jury at the close of voir dire. For these reasons, defendant cannot show that prejudicial error occurred during voir dire and he is not entitled to a new trial on this basis.

III. Other Acts Evidence

Defendant also argues that the trial court erred by allowing the prosecutor to introduce prior "bad acts" evidence in violation of MRE 404(b). "The trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion." *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). However, where, as here, a defendant fails to object to the evidence at trial, "we review the record to determine whether plain error occurred that affected defendant's substantial rights." *Id*.

Officer Robert Miller testified that the victim identified the armed robber as Michael Johnson or Michael Newton. Officer Miller entered the names into a computer at the Battle Creek Police Department and confirmed their existence. Officer Miller further testified that he later found a picture of Johnson and Newton and discovered that they were the same man. From there, Officer Miller asked the police lab to create a photo lineup including the picture of defendant, Michael Johnson. Officer Miller testified that, after the victim visually identified defendant as the armed robber, Miller "completed a warrant request . . . including LIEN history . . . and sent it over to the prosecutor's office."

Defendant contends that Officer Miller's testimony allowed the jury to infer that defendant had prior police contacts or that he committed prior crimes. However, for purposes of MRE 404(b), Officer Miller did not describe a prior act by defendant. We also conclude that the testimony does not imply that defendant had prior contacts with police. Officer Miller did not describe where he obtained defendant's picture and, while Miller referred to a LIEN history, he did not identify whether the history contained any prior crimes by defendant or any information at all. Thus, defendant has failed to show that a plain error occurred because the prosecutor did not introduce evidence of a prior bad act and MRE 404(b) was not implicated.[1]

IV. Ineffective Assistance of Counsel

[1] For the same reason, we reject defendant's claim that defense counsel was ineffective for failing to object to this evidence.

Defendant claims he was denied the effective assistance of counsel because defense counsel failed to (1) retain an expert witness on identification, (2) request a cross-racial jury instruction, and (3) seek the removal of a "tainted" juror.

As this Court explained in *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001):

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

"Because defendant failed to raise this issue in a request for a new trial or a *Ginther*[2] hearing, our review is limited to the existing record." *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

Defendant avers that defense counsel should have moved for leave to retain an identification expert because identity was a critical issue at trial. The decision whether to present expert testimony "is presumed to be a permissible exercise of trial strategy." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Defendant has not overcome this presumption. Importantly, defendant does not contend that the pretrial identification of defendant was flawed or unduly suggestive. Further, the record reflects that the victim identified defendant as the perpetrator not because defendant *resembled* the perpetrator, but because the victim *knew defendant and recognized him* as the person who robbed the store. Thus, defendant's argument regarding the "complex issues of perception and memory" in eyewitness identifications is simply unpersuasive; there was no reason to call an identification expert and defense counsel's failure to do so does not constitute error.

Defendant also claims that defense counsel was ineffective for failing to request a jury instruction on cross-racial identification because he is black and the eyewitness is white. See *People v Cromedy*, 158 NJ 112; 727 A2d 457 (1999). Defendant has failed to demonstrate that such an instruction may have caused a different outcome at trial. *Knapp, supra* at 385. Again, the victim identified defendant as the perpetrator because she knew him as a customer of the store. Further, defendant has presented no authority to establish that a cross-racial identification instruction is required in Michigan. Moreover, and similar to this Court's analysis in *People v*

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Lee, 243 Mich App 163, 185; 622 NW2d 71 (2000), the trial court adequately instructed the jury, "[d]efendant was not deprived of a defense, and the jury was not only aware that identification was an issue but also was informed that the prosecutor had to prove beyond a reasonable doubt that defendant was the perpetrator." There was no basis for defense counsel to request an additional identification instruction and defendant's claim on this issue lacks merit.

Finally, defendant says that defense counsel erred by failing to urge the trial court to dismiss one of the jurors. After the jurors began their deliberations, a juror informed the judge that he learned that his son-in-law, Niels Magnison, worked in the same prosecutor's office as the prosecutor in this case. The judge questioned the juror about the relationship and allowed both attorneys to do the same. The juror stated that he did not know Magnison worked in the same office, that Magnison worked on family law cases, that he never discussed cases with Magnison and that they did not discuss this case. The attorneys expressed satisfaction with the juror's explanation and defense counsel stated that he has known Magnison "for years" and has no "reason to believe that he would initiate any contact [with the juror] regarding the case." The juror then returned to the jury room to deliberate.

Defense counsel's decision not to seek the dismissal of the juror was a matter of trial strategy, that we will not second guess on appeal. *Knapp, supra* at 386; see also *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (O'Connell, PJ, with one Judge concurring in the result). Further, the record clearly reflects that defense counsel did not challenge the juror because the juror was in no way influenced by his relationship with Magnison, who had no involvement in this case. Moreover, were we to conclude that the juror's disclosure might affect his impartiality, defendant has made no showing that he could have challenged the juror for cause or that he was actually prejudiced by the juror's participation in this case. See *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998); *Knapp, supra* at 385. Accordingly, under these circumstances, we reject defendant's claim that defense counsel was ineffective for failing to seek the juror's dismissal.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder